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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 25 and 52**

**[FAR Case 2014-018; Docket No. 2014-0018; Sequence No. 1]**

**RIN 9000-AN07**

**Federal Acquisition Regulation: Contractors Performing Private Security Functions**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to remove the distinction between DoD and non-DoD agency areas of operation applicable for the use of FAR clause "Contractors Performing Private Security Functions Outside the United States" and provide a definition of "full cooperation" within the clause.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[INSERT DATE 60 DAYS**

**AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2014-018 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2014-018". Select the link "Comment Now" that corresponds with "FAR Case 2014-018". Follow the instructions on the screen. Please include your name, company name (if any), and "FAR Case 2014-018" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2<sup>nd</sup> Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite "FAR Case 2014-018" in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2014-018.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110-181) (as amended by other NDAA's, see 10 U.S.C. 2302 Note), is implemented at FAR section 25.302 and the clause at 52.225-26, both entitled "Contractors Performing Private Security Functions Outside the United States," in FAC 2005-67, issued June 21, 2013. These FAR changes regarding private security contractors were effective on July 22, 2013 (see 78 FR 37670) and are applicable to distinct operational areas for DoD contracts versus non-DoD contracts.

Pursuant to section 862, DoD issued DoD Instruction (DoDI) 3020.50, "Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises," which establishes policy, assigns responsibilities, and provides procedures for the regulation of the selection, accountability, and conduct of personnel performing private security functions under a covered DoD contract. This DoDI was amended on August 1, 2011 to expand applicability of DoD's policies regarding private security contracts to peace operations or other military operations or exercises, when designated by the Combatant Commander.

Instead of amending FAR 25.302 and 52.225-6 to expand the applicability for DoD contracts, this rule proposes to

remove the distinction between DoD and non-DoD applicable areas of operation in the FAR, while DoD moves all DoD policy regarding Defense contractors performing private security functions to the Defense Federal Acquisition Regulation Supplement (DFARS) at 225.302 and clause 252.225-7039, both entitled "Contractors Performing Private Security Functions Outside the United States." As a result of this effort (being accomplished simultaneously by DoD under DFARS case number 2015-D021), all policies regarding Defense contractors performing private security functions would be contained in the DFARS.

This rule also proposes to add a definition of "full cooperation" to FAR clause 52.225-26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause. This definition is applicable to both DoD and non-DoD contracts for private security functions to be performed outside the United States.

## **II. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to

select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **III. Regulatory Flexibility Act**

DoD, GSA and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis (IRFA) has been prepared consistent with 5 U.S.C. 603, and is summarized as follows:

The objective of this rule is to make the FAR coverage at FAR section 25.302 and 52.225-26 for contractors performing private security functions generic by removing the areas of operation applicable to DoD, as well as the distinction between DoD versus non-DoD agency contracts, while DoD moves all DoD requirements for defense contractors performing these functions to the DFARS at 225.302 and 252.225-7039. The rule also proposes to add definition of "full cooperation" to FAR clause 52.225-26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause.

Based on data available in the Federal Procurement Data System (FPDS), DoD awarded 103 contracts in Fiscal Year (FY) 2013 that required performance outside of the United States in support of a humanitarian or peacekeeping operation, of which only 13 contracts (12.6 percent) were awarded to small businesses. DoD awarded 403 contracts in FY 2013 in support of contingency operations outside of the United States, of which 63 contracts (15.6 percent) were awarded to small businesses. Therefore, it is estimated that this rule will apply to approximately 76 small businesses.

This rule does not create any new reporting, recordkeeping, or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2014-018), in correspondence.

#### **IV. Paperwork Reduction Act**

This rule affects the certification and information collection requirements in FAR clause 52.225-26, currently

approved under OMB Control Number 9000-0184, titled "Contractors Performing Private Security Functions Outside the United States," in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible because the proposed rule merely removes the distinction between DoD and non-DoD contract areas of applicability for use of FAR clause 52.225-26 for contracts requiring performance of private security functions outside the United States.

**List of Subjects in 48 CFR Parts 25 and 52**

Government procurement.

**Dated: May 19, 2015.**

William Clark,  
Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 25 and 52, as set forth below:

1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

**PART 25- FOREIGN ACQUISITION**

2. Amend section 25.302-3 by-

a. Removing paragraph (a);

b. Redesignating paragraphs (b) through (e) as paragraphs (a) through (d), respectively; and

c. Revising newly designated paragraph (a).

The revision reads as follows:

**25.302-3 Applicability.**

(a) This section applies to contracts that require performance outside the United States-

(1) In an area of combat operations as designated by the Secretary of Defense; or

(2) In an area of other significant military operations as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

\* \* \* \* \*

3. Amend section 25.302-4 by-



a. Revising the first sentence of paragraph (a) (1); and

b. Removing from paragraph (a) (2) "required to cooperate" and adding "required to fully cooperate" in its place.

The revision reads as follows:

**25.302-4 Policy.**

(a) General. (1) The policy, responsibilities, procedures, accountability, training, equipping, and conduct of personnel performing private security functions in designated areas are addressed at 32 CFR part 159, entitled "Private Security Contractors Operating in Contingency Operations". \* \* \*

\* \* \* \* \*

4. Amend section 25.302-6 by revising paragraph (a) to read as follows:

**25.302-6 Contract clause.**

(a) Use the clause at 52.225-26, Contractors Performing Private Security Functions Outside the United States, in solicitations and contracts for performance outside the United States in an area of—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State.

\* \* \* \* \*

#### **PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

5. Amend section 52.212-5 by—

- a. Revising the date of the clause;
- b. Revising paragraph (b) (45);
- c. Revising paragraph (e) (1) (xvi);
- d. In Alternate II:
  - i. Revising the Alternate date;
  - ii. Redesignating paragraphs (e) (1) (ii) (O) and (P) as paragraphs (e) (1) (ii) (P) and (Q), respectively; and
  - iii. Adding a new paragraph (e) (1) (ii) (O).

The revisions and addition read as follows:

#### **52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.**

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE  
ORDERS—COMMERCIAL ITEMS (DATE)

\* \* \* \* \*

(b) \* \* \*

\_\_\_\_ (45) 52.225-26, Contractors Performing Private Security Functions Outside the United States (DATE) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

\* \* \* \* \*

(e) (1) \* \* \*

(xvi) 52.225-26, Contractors Performing Private Security Functions Outside the United States (DATE) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

\* \* \* \* \*

Alternate II (DATE). \* \* \*

\* \* \* \* \*

(e) (1) \* \* \*

(ii) \* \* \*

(O) 52.225-26, Contractors Performing Private Security Functions Outside the United States (DATE) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

\* \* \* \* \*

6. Amend section 52.213-4 by revising the date of the clause and paragraph (a)(2)(viii) to read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items)**

\* \* \* \* \*

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (DATE)

(a) \* \* \*

(2) \* \* \*

(viii) 52.244-6, Subcontracts for Commercial  
Items (DATE).

\* \* \* \* \*

7. Amend section 52.225-26 by—

a. Removing from the introductory text "25.302-6"  
and adding "25.302-6," in its place.

b. Revising the date of the clause;

c. Revising the introductory text of paragraph  
(a);

d. Adding to paragraph (a), in alphabetical  
order, the definitions for "Area of Combat operations",  
"Full Cooperation", and "Other significant military  
operations";

e. Revising paragraph (b);

f. Revising paragraph (c) (2) (i);

g. Removing from the introductory text of  
paragraph (c) (3) "Cooperate" and adding "Provide full  
cooperation" in its place; and

h. Revising paragraph (f).

The revisions and additions read as follows:

**52.225-26 Contractors Performing Private Security  
Functions Outside the United States.**

\* \* \* \* \*

CONTRACTORS PERFORMING PRIVATE SECURITY FUNCTIONS OUTSIDE THE UNITED STATES (DATE)

(a) Definitions. As used in this clause—

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of contractors performing private security functions working for Government agencies is required.

Full Cooperation. (1) Means disclosure to the Government of the information sufficient to identify the nature and extent of the incident and the individuals responsible for the conduct. It includes providing timely and complete responses to Government auditors' and investigators' requests for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—

(i) The Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney-client privilege or Fifth Amendment rights; and

(3) Does not restrict the Contractor from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that is carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force.

\* \* \* \* \*

(b) Applicability. If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the following designated areas:

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(c) \* \* \*

(2) \* \* \*

(i) Qualification, training, screening (including, if applicable, thorough background checks), and security requirements established by 32 CFR part 159, Private Security Contractors Operating in Contingency Operations;

\* \* \* \* \*

(f) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that will be performed outside the United States in areas of—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, upon agreement of the Secretaries of Defense and State that the clause applies in that area.

\* \* \* \* \*

8. Amend section 52.244-6 by revising the date of the clause and paragraph (c)(1)(xii) to read as follows:

**52.244-6 Subcontracts for Commercial Items.**

\* \* \* \* \*

SUBCONTRACTS FOR COMMERCIAL ITEMS (DATE)

\* \* \* \* \*

(c) (1) \* \* \*

\* \* \* \* \*

(xii) 52.225-26, Contractors Performing Private Security Functions Outside the United States (DATE) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

\* \* \* \* \*

**[Billing Code: 6820-EP]**

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